

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 10, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP733-CR**

**Cir. Ct. No. 2001CF1567**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**NICHOLAS G. MISTRIOTY,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
ELLEN R. BROSTROM, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Nicholas G. Mistrioty, a *pro se* prison inmate, appeals from an order denying his motion for additional sentence credit. He argues that he is entitled to sentence credit for the time he spent on Global Positioning System (GPS) monitoring pursuant to WIS. STAT. § 301.48(2g) (2011-

12).<sup>1</sup> Because Mistrioty was not subject to an escape charge while he was on GPS monitoring, he is not entitled to sentence credit for that period of time. Therefore, we affirm.

## BACKGROUND

¶2 In 2001, Mistrioty was convicted of one count of second-degree sexual assault of a child and one count of child enticement (exposing a sex organ), contrary to WIS. STAT. §§ 948.02(2) and 948.07(3) (1999-2000).<sup>2</sup> He was sentenced to two concurrent ten-year terms in prison, but the sentences were stayed and he was placed on probation. His probation was later revoked and he went to prison.

¶3 In November 2009, Mistrioty was released on parole. According to Mistrioty, he was placed on GPS monitoring pursuant to WIS. STAT. § 301.48(2g), which governs the GPS tracking of certain sex offenders.<sup>3</sup> Mistrioty's parole was revoked in 2011 and he was returned to prison. He was granted sentence credit for the time he spent in jail, but he was not awarded any sentence credit for the time he was on GPS monitoring pursuant to WIS. STAT. § 301.48(2g).

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

<sup>2</sup> The Honorable Kitty K. Brennan accepted Mistrioty's no-contest pleas and the Honorable M. Joseph Donald sentenced Mistrioty. The Honorable Ellen R. Brostrom issued the order denying sentence credit that is at issue in this appeal.

<sup>3</sup> The record contains only limited information about the time Mistrioty served in prison and in the community. For purposes of this appeal, this court accepts Mistrioty's representations concerning his periods of incarceration and his placement on GPS monitoring.

¶4 Mistrioty sought additional sentence credit from the Department of Corrections, which denied his request. In March 2013, Mistrioty filed a motion with the trial court seeking 492 days of sentence credit for the time he spent on GPS monitoring pursuant to WIS. STAT. § 301.48(2g). The trial court denied the motion in a written order, relying on *State v. Magnuson*, 2000 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536 (2000). This appeal follows.

## DISCUSSION

¶5 At issue is whether Mistrioty is entitled to sentence credit pursuant to WIS. STAT. § 973.155 for the time he spent on GPS monitoring pursuant to WIS. STAT. § 301.48(2g). This presents a question of law that we review *de novo*. See *Magnuson*, 233 Wis. 2d 40, ¶11 (“Statutory interpretation and the application of a statute to particular facts present questions of law that we review independently of the determinations rendered by the circuit court and the court of appeals.”).

¶6 A prisoner is eligible for credit against a sentence for time spent “in custody in connection with the course of conduct for which sentence was imposed.” WIS. STAT. § 973.155(1)(a). *Magnuson* held that the term “in custody” in § 973.155(1)(a) means subject to a criminal escape charge for absconding. See *Magnuson*, 233 Wis. 2d 40, ¶25.

In determining whether an individual would have been subject to an escape charge, we look both to the general escape statute, WIS. STAT. § 946.42, as well as “other statutory provisions in which the legislature has classified certain situations as restrictive and custodial by attaching escape charges for an unauthorized departure from those situations.”

*State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶32, 250 Wis. 2d 214, 640 N.W.2d 527 (quoting *Magnuson*, 233 Wis. 2d 40, ¶26).

¶7 Mistrioty implicitly acknowledges that WIS. STAT. § 301.48 does not contain a provision subjecting a person who violates the terms of GPS monitoring to an escape charge. However, he presents several reasons why he believes he is nonetheless entitled to sentence credit for the time he spent on GPS monitoring pursuant to § 301.48(2g).

¶8 First, Mistrioty argues that “because he was subject to prosecution for a new felony for tampering or interfering with the monitoring equipment,” he was “in custody” as that term is used in WIS. STAT. § 973.155(1)(a). *Magnuson* rejected a similar argument, explaining:

Here we are confronted with a situation in which Magnuson was subject to a charge of felony bail jumping for a violation of the conditions of his bond. He was not in danger of being charged with escape under any applicable statute. Although Magnuson could suffer negative legal consequences for leaving his home detention with electronic monitoring or for violating his other release conditions, we do not believe that these consequences transformed his situation into custody for entitlement to sentence credit.

*Id.*, 233 Wis. 2d 40, ¶46. Consistent with *Magnuson*, Mistrioty’s argument fails. The fact that Mistrioty may “suffer negative legal consequences” for not following the terms of GPS monitoring does not mean that he is entitled to sentence credit. *See id.* Rather, because Mistrioty was not subject to an escape charge during the time he was on GPS monitoring, he is not entitled to sentence credit. *See id.*, ¶25.

¶9 Next, Mistrioty asserts that “in light of the significant changes in the law and in the supervision of those convicted of crime[s] since 2000, it is the intent, rather than the literal language, of the *Magnuson* court that should control.” (Bolding and italics added.) He explains: “[D]ue to the passage of time, legislative action and continuing advances in monitoring of persons ... the

**Magnuson** rule can no longer be applied so narrowly.” (Bolding added.) Mistryoty concedes that this court cannot modify or overrule Wisconsin Supreme Court precedent. See *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (“The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.”). Nonetheless, he claims that “such drastic action is not required” and that this court can “simply create a new rule of law for circuit courts to apply to those persons subject to GPS monitoring.” (Bolding omitted.) We are not persuaded by Mistryoty’s arguments. We are bound by **Magnuson**, a case that examined at length the various situations in which prisoners are released into the community and set forth “a bright-line rule” as “the better approach for determining custody in the context of sentence credit.” See *id.*, 233 Wis. 2d 40, ¶22; see also *Estate of Sheppard ex rel. McMorrow v. Specht*, 2012 WI App 124, ¶7, 344 Wis. 2d 696, 824 N.W.2d 907 (“While this court has a role in developing the law as it exists, we cannot declare new law; we are mainly an error-correcting court.”).

¶10 Finally, Mistryoty argues that he is entitled to sentence credit because “[i]n reality, GPS monitoring is more restrictive than a minimum security prison or jail work release program.” He provides details of the restrictions and challenges for those on GPS monitoring. Further, noting that United States Supreme Court and Wisconsin Supreme Court cases have recognized that placing a GPS monitoring device on a car invades the driver’s privacy rights,<sup>4</sup> Mistryoty questions how “attaching that same device *to the person* [can] be somehow *less* invasive of those same privacy interests.” (Bolding omitted.)

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<sup>4</sup> See *United States v. Jones*, \_\_ U.S. \_\_, 132 S. Ct. 945 (2012); *State v. Brereton*, 2013 WI 17, 345 Wis. 2d 563, 826 N.W.2d 369.

¶11 We understand the arguments that Mistry is making, but it is not within this court's power to overrule or modify *Magnuson*. See *Cook*, 208 Wis. 2d at 189. Pursuant to *Magnuson*, Mistry is not entitled to sentence credit. Mistry's remedy lies with the Wisconsin Supreme Court, which could modify *Magnuson*, or with the legislature, which could choose to authorize sentence credit for those who are on GPS monitoring pursuant to WIS. STAT. § 301.48(2g).

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

